1998

Richard K. Bertoch, William E. Poulsen v. Bruce A. Lefavi : Brief of Appellant

Utah Court of Appeals

Ronald C. Barker; Attorney for Defendant/Appellant.
Douglas E. Griffith; Kessler & Rust; Attorneys for Plaintiff/Appellee.

COPY

IN THE COURT OF APPEALS
FOR THE STATE OF UTAH

RICHARD K. BERTOCH, an individual and WILLIAM E. POULSEN, an individual,

Defendant/Appellant,

vs.

BRUCE A. LEFAVI, an individual,

Plaintiff/Appellee.

CORRECTED
BRIEF
OF APPELLANT

Docket No. 981392

District Court No. 920906147

Priority Classification 15

*****

APPEAL FROM THE RULING
OF THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE LESLIE LEWIS PRESIDING

*****

Douglas E. Griffith
KESLER & RUST
36 South Street, Suite 2000
Salt Lake City, Utah 84111
Telephone (801) 363-7611
Attorneys for the Plaintiff/Appellee

Ronald C. Barker, # 0208
2870 South State Street
Salt Lake City Utah 84115
Telephone: (801) 486-9636
Attorneys for Defendant/Appellant

IN THE COURT OF APPEALS
FOR THE STATE OF UTAH

RICHARD K. BERTOCH, an individual and WILLIAM E. POULSEN, an individual,

Defendant/Appellant,

vs.

BRUCE A. LEFAVI, an individual,

Plaintiff/Appellee.

CORRECTED
BRIEF
OF APPELLANT

Docket No. 981392

District Court No. 920906147

Priority Classification 15

*****

APPEAL FROM THE RULING
OF THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH
THE HONORABLE LESLIE LEWIS PRESIDING

*****

Douglas E. Griffith
KESLER & RUST
36 South Street, Suite 2000
Salt Lake City, Utah 84111
Telephone (801) 363-7611
Attorneys for the Plaintiff/Appellee

Ronald C. Barker, # 0208
2870 South State Street
Salt Lake City Utah 84115
Telephone: (801) 486-9636
Attorneys for Defendant/Appellant

I. TABLE OF CONTENTS

II. TABLE OF AUTHORITIES

A. Cases

B. Texts

C. Constitution

D. Statutes and Rules

III. STATEMENT OF JURISDICTION

The Utah Supreme Court has jurisdiction in this matter pursuant to Section 78-2-(3)(j) Utah Code Ann. (1996). See also Rules 3 and 4, Utah Rules of Appellate Procedure. However, this Court obtained jurisdiction when this appeal was poured-over from the Utah Supreme Court.

IV. NATURE OF PROCEEDINGS

This proceeding is an appeal from an Order and Final Judgment and Modifications thereto issued by the Honorable Leslie Lewis whereby she awarded judgement in favor

of plaintiff/appellee. Judge Lewis awarded, *inter alia*, damages, together with prejudgment interest and augmented the award with post judgment interest.

V. RELATED PRIOR APPEALS

The are no prior appeals relating to this matter. This *Corrected Brief on Appeal* is to correct a lodged *Brief on Appeal* timely filed on behalf of Appellants on January 29, 1999.

VI. STATEMENT OF THE ISSUES ON APPEAL

A. WHETHER THE LOWER COURT ABUSED ITS DISCRETION AND/OR ERRED WHEN IT RULED THAT PRE-JUDGMENT INTEREST IS ALLOWED WHERE SUFFICIENT CERTAINTY DID NOT EXIST AS TO THE AMOUNT OF THE CLAIM PRIOR TO THE COURT RULING.

B. WHETHER THE LOWER COURT ABUSED ITS DISCRETION AND/OR ERRED IN NOT CORRECTING AN EXPERT'S MATHEMATICAL ERROR IN COMPUTING A MATERIAL FACT, I.E., EACH PARTY'S PROPORTIONATE SHARE IN THE PROPERTY AT ISSUE.

C. WHETHER THE COURT ERRONEOUSLY DEVIATED FROM OR MIS-APPLIED THE PARTIES' STIPULATION IN ASSESSING DAMAGES.

D. WHETHER THE TRIAL COURT ACTED INCONSISTENTLY, EXCLUDING APPELLANTS' COST OF ACQUIRING THE REST OF THE PARTNERSHIP TO DETERMINE EACH OF THE PARTIES' "PROPORTIONATE SHARE," BUT THEN GIVING LEFAVI A FULL SHARE OF THE PROJECT OWNED BY THE APPELLANTS BEFORE LEFAVI BOUGHT IN.

VII. STATEMENT OF CASE

A. Nature of the Case.

This is an appeal from an Order and Final Judgment and Modifications thereto issued by the Honorable Leslie Lewis, whereby she awarded judgement in favor of plaintiff/appellee. *Order and Final Judgment* was entered on June 2, 1998 and modified on June 15, 1998. See copy of *Order Of Final Judgment,* attached herewith as Appendix A and *Modification of Judgment*, attached herewith as Appendix B, both, incorporated herein.

Appellee Bruce A. Lefavi ("Lefavi") sought damages against Richard A. Bertoch, ("Bertoch") and William E. Poulsen ("Poulsen") appellants, (also known collectively as the "Appellants"), for breach of contract, fraud, false representation, conversion and

fiduciary duty of care. The appellants counterclaimed alleging malicious prosecution, abusive civil process, and breach of contract.

B. Course of Proceedings.

The Honorable Leslie Lewis after trial, found for plaintiff/appellee Lefavi, and awarded judgment in his favor, and against Bertoch and Poulson jointly and severally. During the trial the parties stipulated to accounting disputes that were pivotal to the central issues of the case. However, not all of the main issues were stipulated to, and therefore several were tried and determined in the lower court.

The stipulation and the controverted evidence are central to this appeal. The Appellants appeal the ruling of the lower court with its accompanying *Findings of Fact and Conclusions of Law*. See copy of *Findings of Fact and Conclusions of Law* attached herewith as Appendix C and incorporated herein. These findings and conclusions are incorrect in some instances and in others are against the great weight of evidence proffered at trial.

C. Summary of Relevant Facts.

Most of the following factual summaries are derived directly from *Findings of Fact* contained in Appendix C. Citations to the Record or Transcript are in the footnotes.

1. In or around the middle of 1975, a partnership known as the Richards Street Development Company ("Richards Street") acquired a ½ interest in four vacant lots ("Las Vegas Project") adjacent to the Las Vegas Airport from Dasco, Inc., a Nevada corporation, and Dudley Smith, a resident of Nevada. Bertoch and Poulsen each owned 1/5th of Richards Street.[1]

2. Richards Street's objective was to construct a hotel on the property. Richards Street, however, was unable to obtain hotel financing and the lots were later offered for sale.[2]

3. In or around 1978, Bertoch and Poulsen bought the remaining 3/5ths of Richards Street for $563,500. They also paid commissions of $101,519 in connection with purchase of the lots, which were the partnership's main assets.[3]

---

[1] R. 1479, *Findings of Fact* #2-3.

[2] R. 1479, *FOF* 2.

[3] R. 1358, Footnote 3.

4. By July 1978, the Las Vegas Project consisted of three parcels of real property, known to the parties as Lot Numbers 8, 10 and 11. [4]

5. During July 1978, Lefavi purchased a "pro-rata share" of Bertoch's share of the project, which in April, 1979 was changed to a "proportionate share" of Appellants' interest in the Las Vegas Project.[5] This gave Lefavi the right to participate in a share of profits which was "proportionate" with his investment, when compared to that of the Appellants. Id.

6. The amount of Lefavi's initial investment was $6,600. From July 1978 through December, 1980, Lefavi made additional investments totaling $68,875. [6]

7. Appellants made lease, option, contract and expense payments over a period of years from their additional investments to preserve their investment rights. [7] Lefavi did not participate in those payments, and as indicated in # 6 above, his investment stopped after $68,875. Id.

---

[4] R. 1479, *FOF* 5.

[5] There was a dispute as to whether Lefavi purchased a "proportional interest" in only Bertoch's share of the Las Vegas Project, or of both Appellants. For purposes of this Appeal we will assume that he purchased a share of both Appellants' interest in the project.

[6] R. 1481, *FOF* 8-10.

[7] R. 1484, *FOF* 25.

8. The lots were sold in separate transactions. In August 1983, after the first lot sale, a partial accounting computed Lefavi's share of the sale proceeds as $32,182. Appellants paid the amount to Lefavi.[8] The second sale took place in 1985 and the third in 1988.[9] No proceeds from later sales were paid to Lefavi.

9. In an effort to narrow the issues and shorten the trial, Appellants and Levafi stipulated that Lefavi was entitled to receive a "proportionate share" of the proceeds from sales of the (4) lots, and that Appellants paid Lefavi $68,875 to purchase Lefavi's interest in the Las Vegas Project.[10]

10. Accounting records were inadequate for a full accounting. In order to determine each party's "pro rata" share of the profit, it was necessary to determine the proceeds from lot sales, costs, project expenses, the costs to Appellants and Lefavi, etc. The accounting records for the period from 1978 until the 3rd sale in 1988, were incomplete. Substantial portions of

---

[8] Lefavi admits that he received and retained that payment, but claims that it was paid as compensation for some vague service he allegedly furnished to an unrelated entity in which Bertoch had a small financial interest. Notwithstanding evidence to the contrary, the Court refused to allow credits to Appellants for that payment.

[9] R. 1484, *FOF* 28.

[10] See Exhibit 140, Appendix D..

the accounting records were missing, and the records located were inadequate for a complete accounting. Each separately represented party employed accountants who attempted to arrive at an accounting from the partial records.[11]

11. During the trial, experts and parties compromised and settled numerous disputed fact and accounting issues.[12] But for the stipulation, numerous disputes would have been decided by the Court after weighing disputed evidence. See Appendix D. **That *Stipulation* is key to this Appeal.**

12. These issues included (a) appropriateness of alternative accounting methods, (b) the income received form the lot sales, rent, etc., (c) the amount of income received from foreclosing property pledged by a defaulting buyer, (d) whether each of the (9) stipulated cost items should be added as part of the cost of the lots, (e) the amount to decrease Appellant's cost of purchasing the 3/5 interest in the Richards partnership, (f) the amount of expenses incurred, (g) projecting Lefavi's share of proceeds to be between 3.49% and 5.27% of the sale proceeds based on

---

[11] Tr. 598-604.

[12] Tr. 598-604.

a stipulation that the cost of the Las Vegas Project was estimated to be between $1,440,368 and $2,105,387, (h) concurring that Lefavi also received an additional $53,715 from Bertoch as a result of a series of stock market transactions.[13]

13. Lefavi adduced no testimony or other evidence which disputed appellants' testimony on point. Canceled check and other documents showed that appellants had paid $665,019 to buy the other 3/5 of the Richards partnership, and for commissions to acquire the Las Vegas Project.[14]

14. Rather than directly contradict the testimony of Bertoch, Lefavi asserted the Fifth Amendment when asked questions regarding stock transactions, resulting in a possible offset of amounts allegedly owed by appellants to Lefavi.[15]

15. The trial court ruled that appellants had not met their burden of proof for the offsets. Even though appellants testimony, canceled checks and other

---

[13] See Exhibit 140.

[14] In Exhibit 140, the parties stipulated that appellants paid $400,000 to purchase 40% of Richard Street owned by Daines and Nelson and $163,500 to DuBois to purchase his 20% of the Nevada partnership who, together with Dasco, owned the Las Vegas Properties; and that defendants paid commissions of $101,519 to Hansen and Bova to purchase the Las Vegas Properties, a total $665,01. See page 2, lines (16), (17) & (18) of page 2, Exhibit 140.

[15] R. 1587.

documents concerning the additional $665,019 invested by appellants was undisputed, the court held that Appellants had not "marshaled the necessary evidence ... to meet their burden proof." Id.

16. At the conclusion of the trial, the lower court ruled in favor of Lefavi (despite the great weight of evidence).[16] She awarded **judgment** against the Appellants, jointly and severally, in the principal amount of **$159,717.00, together prejudgment interest of $96,482.00** as of December 31, 1997, and an additional prejudgment interest from January 1, 1998 to the date of judgment of $3,911.25, for a **total judgment of $260,110.25**. This judgment was further augmented by post-judgment interest at a rate of 7.468%.[17]

17. Appellants fought hard to correct the *Findings* and *Judgment*, and especially to eliminate the prejudgment interest. The efforts were unsuccessful.

---

[16] R. 1503-05.

[17] R. 1503-05.

V. SUMMARY OF ARGUMENT[18]

Because the damage amounts were not fixed until a mid-trial stipulation, and for public policy and other reasons, prejudgment interest should be denied and deleted from the judgment.

Judge Lewis has made and refused to correct mathematical, legal and factual errors, which grossly inflated the judgment she entered against defendants. This Court should order a new trial, or at least that the trial court correct the errors.

VI. ARGUMENT

A. Prejudgment interest was improperly awarded.

1. The trial court erred when it allowed pre-judgment interest in an award where damages were disputed, and were not amenable to mathematical certainty prior to a decision by the court. Prejudgment interest accounted for over $100,000 of the $260,000 judgment entered. Its award should be reversed.

---

[18] This *Corrected Brief on Appeal* is filed by Appellants as a correction of its *Brief on Appeal* lodged with the Court on January 29, 1999.

A "[t]rial court's decision to grant or deny prejudgment interest presents a question of law which the Supreme Court reviews for correctness."[19] The standard of review for this issue, then, is the correction of error standard,[20] with no deference to conclusions made by the trial court.[21] "Correctness means that the appellate court decides the matter for itself and does not defer in any degree to the trial judge's determination of law."[22]

A long series of Utah cases has considered and refined the rules as to the circumstances which must exist for prejudgment interest to be allowable. Rules and factors concerning awards of prejudgment interest were summarized by the Court of Appeals in their 1997 decision in *Castillo v. Atlanta Casualty Company*:[23] In *Castillo*

---

[19] *Cornia v. Wilcox*, 898 P.2d 1379 (Utah 1995); see also, *Coalville City v. Lundgren*, 930 P.2d 1206 (Utah App. 1997); *James Contractors v. Salt Lake City Corp.*, 888 P.2d 665 (Utah App. 1994).

[20] *Id.* See also, *Pennington v. Allstate Ins. Co.*, 358 Utah Adv. Rep. 5, 7 (Utah 1998).

[21] *Id.*

[22] *Morse v. Packer*, No. 970531 (January 22, 1999).

[23] *Castillo v. Atlanta Casualty Company*, 939 P.2d 1204, 1212 (Utah App. 1997). The Court stated the reasons and cited case-law precedent for award of prejudgment interest in an appropriate case in part as follows:

> In Utah, prejudgment interest "represents an amount awarded as damages due to the opposing party's delay in tendering the amount owing under an obligation." *L & A Drywall, Inc. v. Whitmore Constr. Co.*, 608 P.2d 626, 629 (Utah 1980). *Accord Hermes Assocs. v. Park's Sportsman*, 813 P.2d 1221, 1224 (Utah Ct. App. 1991); *Vasels v. LoGuidice*, 740 P.2d 1375, 1378 (Utah Ct. App. 1987); 22 Am.Jur.2d *Damages* § 82 (1988). *See also Trail Mountain Coal Co. v. Utah Div. of State lands & Forestry*, 921 P.2d 1365, 1370 (Utah 1996) (stating that, as a matter of public policy, prejudgment interest,

the Court specifically limited the circumstances when prejudgment interest may be awarded as follows:

> It (prejudgment interest) may be awarded **where 'damage is complete, the loss can be measured by facts and figures, and the amount of loss is fixed as of a particular time.'**[24]

In support of that statement of prejudgment interest law, the *Castillo* Court cited *Andreason,*[25] which more fully explained limitations on the award of prejudgment interest.

> Although damages may be unliquidated, they must be **calculable through a mathematically certain procedure allowing the court or the jury to fix the amount by following 'fixed rules of evidence and known standards of value ... rather than be[ing] guided by their best judgment in assessing the amount' or evaluating elements lacking fixed standards** by which to measure their value. *Fell,* 88 P. at 1007; *Price-Orem v. Rollins, Brown & Gunnell*, 784 P.2d 475, 483 (Utah App. 1989). If sufficient certainty exists, courts should allow interest from the time when damages became fixed rather than from the date of the judgment. *Bjork*, 560 P.2d at 317. However, **'where**

> compensates party for depreciating value of amount owed and deters intentional withholding of money owed). *cert denied,* ____ U.S. ____, 117 S.Ct. 1017, 136 L. Ed. 2d 894 (1997).

Castillo, id., 939 P.2d @ 1212.

[24] *Castillo*, supra, 939 P.2d @ 1212 (emphasis added).

[25] See quotation from *Castillo* above. *Andreason v. Aetna Cas. & Sur Co.*, 848 P.2d 171, 177 (Utah Ct. App. 1993), which was cited with approval by the Utah Court of Appeals in 1997 in *Castillo v. Atlanta Casualty Company*, 939 P.2d 1204, 1212 (Utah App. 1997).

> **damages are incomplete and are peculiarly within the province of the jury to assess at the time of trial,' then prejudgment interest is inappropriate.** *Price-Orem*, 784 P.2d at 483 (quoting Fell, 88 P. at 1006). [26]

2. In this case the lack of certainty precludes prejudgment interest. This case is replete with disputed factual determinations which the trial court of necessity had to "assess," and which required Judge Lewis to "be guided by [her] best judgment in assessing the amount." There were multiple disputed facts which the lower court had to consider in "evaluating elements lacking fixed standards by which to measure their value." Id.

Among the decisions in this case concerning which the trial court had to "be guided by" its "best judgment in assessing the amount" owed (if any), each of which precludes the award of prejudgment interest, are the following:

(a) **Accounting records were incomplete.** The accounting records concerning the effort known as the "Las Vegas Project" were incomplete, inadequate and/or non-existent. Those which did exist were very old, with many dating back to the mid-to-late 1970s. It was necessary for the accounting experts employed by both parties to spend literally hundreds of hours attempting to reconstruct an accounting of the

---

[26] *Andreason, supra*, 848 P.2d @ 177 (emphasis added).

Project. This was done based on incomplete information which was obtained from various sources, including income tax returns, documents obtained from (former partner) Dudley Smith,[27] from Appellants' old files, etc.[28] The paucity of financial records did not lend themselves to any certainty or liquidated amount prior to trial.

(b) **Compromise of disputed facts between accountants.** In an effort to limit the time necessary to determine issues, and the complex amounts to be considered by the court, the experts met and for purposes of the trial negotiated compromises of various disputed items and amounts. The result was set forth in trial Exhibit 140,[29] to which the parties stipulated.

---

[27] Dudley Smith operated DASCO, which owned a ½ interest in the Las Vegas Project, and which was heavily involved in the related transactions. On motion of Respondent Lefavi, a scheduled trial date was continued because two boxes of documents in the possession of Mr. Smith had recently been located, which boxes included many documents concerning financial transactions involving the Project.

[28] Gert Foerster, Respondent Lefavi's CPA, testified that he spent in excess of 100 hours reviewing records to arrive at his conclusions, but that he did not talk with Hansen, DuBois, Daines, Dudley Smith, Jill Langerman (a CPA who was DASCO's outside accountant), or to Thoms McMillan, (the buyer of some of the subject lots), in connection with his investigation. Brad Townsend, appellants' CPA, did talk with DuBois, Daines, Dudley Smith, Jill Langerman, CPA (from whom Townsend obtained some very helpful accounting working papers), to lot purchaser McMillan, and to others in connection with his investigation, in addition to spending even more time than that spent by Foerster, reviewing records and reconstructing the accounting records to determine the amounts invested by each of the parties, amounts received from sale of property, other income and expenses of the venture, what income was received from foreclosure and sale of lots received in connection with the Sellen sale, amounts paid by appellants to Lefavi from proceeds from sale of parcels of land which were part of the LV Project, credit due by reason of payment of the entire proceeds received from stock sold by Bertoch at the request of Lefavi, etc. See Townsend's narrative discussion of his work in Exhibit 200.

[29] See Appendix D for a copy of Exhibit 140.

3. The experts narrowed the disputes, but this does not mean the damages were liquidated two decades earlier, allowing for prejudgment interest. Despite the uncertainty of damages before they were determined by her, it appears that Judge Lewis turned the stipulation into a reason to allow the interest, as if the stipulation in the midst of trial meant that the disputes never existed.

In Exhibit 140[30] the accountants summarized the results of their compromise agreements, identified remaining unresolved items to be decided by the trial court, and agreed upon the net dollar amount effect (set forth as a range) of each such decision by the court. If not for that compromise, each of the disputed facts resolved by the compromise between the parties and their accountants would have been submitted to the trial court for a decision based upon disputed evidence. The parties accepted the accountants' negotiated agreements by stipulating to Ex. 140.[31]

4. Disputed issues were resolved by accountants' negotiations. Disputed fact issues resolved by the negotiated agreement between the accountants included the disputes set forth below. If not for the compromise between the accountants, it would have been necessary for Judge Lewis to have decided each of the following disputed fact

---

[30] See Appendix D to this Brief.

[31] Tr. 598-604.

issues by "evaluating elements lacking fixed standards by which to measure their value,"[32] each of which preclude the award of prejudgment interest. The experts agreed on:

(i) **Appropriate accounting method.** The accounting methods used by opposing experts were in dispute. Essentially, disagreeing on which of several appropriate accounting methods should be used in making their calculations;[33] each of which arrived at a different amount. Had the trial court heard the evidence and decided which method was the most appropriate, it would have been necessary for the court to "be guided by" its "best judgment" in determining which method was the better, and to thereby "assess(ing) the amount" of Lefavi's share.

(ii) **Amount of proceeds from sale of property.** The accountants resolved their dispute as to the net amount received from each of the three property sales;[34]

---

[32] See quotation cited in ¶ 5, P. 3 above, from *Anderson v. Aetna Cas. & Sur Co.*, 848 P.2d 171, 177 (Utah App. 1993). *Anderson* was quoted with approval in 1997 in *Castillo, supra.*

[33] Although the accountants ultimately agreed to use the tax return method, Townsend's computations included three alternative methods (Appellants' proposed Ex. 201), including: (a) the Cash Flow Method; (b) the Escrow Method; and (c) the tax return method. By reason of the agreement between the accountants Ex. 201, Ex. 203, 215 and 218 and supporting Ex. 202 thru 223 were not actually used in the trial, however said exhibits demonstrated three alternative accounting methods which were used in an effort to arrive at an accounting from inadequate records.

[34] A substantial dispute existed between the accountants as to the net proceeds received from the three property sales which ultimately resulted in cash flow to Bertoch and Poulson.

(iii) **Net proceeds from foreclosure and sale of lots.** The net income received from foreclosure and sale of lots obtained by foreclosing a certain Trust Deed known as the Sellen Trust Deed was no longer an issue after the Exhibit 140 stipulation by the accounting experts;

(iv) **Purchase price of property.** The accountants agreed on the amount of nine separate items to be added to the property cost basis, as shown on the income tax returns;

(v) **Bertoch & Poulson cost to buy share of other owners.** The accountants helped the parties stipulate to a reduced amount paid by appellants to purchase DuBois' share of the project and the amount paid by appellants to purchase the Daines and Nelson share of the project, leaving to Judge Lewis the decision as to whether some or all of those costs would be allowed as appellants' costs;

(vi) **Income and expenses of venture.** The accountants considered and agreed upon the effect of General and Administrative expenses of the venture;

(vii) **Alternative claim regarding Lefavi's share.** The accountants agreed that Lefavi's share of the sales proceeds was 3.49% or 5.27%, or some percentage between those amounts, depending upon whether the cost to appellants to purchase from

others their shares of the Las Vegas Project was part of appellants' investment.[35] Those alternate percentages are based upon the amounts the trial court determined to be the amounts invested in the Las Vegas Project by Bertoch and Poulson, which is necessary in order to determine Lefavi's "proportional interest."[36]

(viii) **Agreements as to appellants' investment in Project.** The accountants agreed that Bertoch's and Poulson's combined investment was at least $1,440,368, that Bertoch and Poulson had paid an additional $665,019.44 to Hansen, Bova, DuBois, Daines and Hansen, and that if the trial court determined that those additional payments were part of their investment, the appellants' total investment was $2,105,387.39.[37]

---

[35] See Line (5), columns (B) and (C) of page 1 of Ex. 140 and discussion below.

[36] See Ex. 9.

[37] See Line (3), Column (C) of page 1 of Ex. 140. See Appendix D for a copy of Exhibit 140. The difference of $665,019.44 is the total of the amounts agreed upon between the accountants as shown on page 2, Col. (B) of Ex. 140, for the following payments made by Bertoch & Poulsen:

Line #	Purpose of payment	Amount paid
(16)	Payment of Commissions to Hansen and Bova	$ 101,519.44
(17)	Buyout of DuBois	163,500.00
(18)	Buyout of Daines & Nelson ($200,000 each)	400,000.00
	Total	**$ 665,019.44**

Bertoch testified that they had made payments to Hansen, Bova and Dubois which were $57,677.73[38] larger than the $265,019.44 agreed upon between the accountants, as shown on Ex. 140.[39] The total amount paid to Hansen, Bova and Dubois were disputed issues of fact which, but for the accountants' agreement, the court would have had to decide based upon conflicting evidence. To simplify the disputes, as part of the stipulation Bertoch waived the claim that the amount was higher. **Even though the agreement between the accountants made it unnecessary for the Court to rule on the disputed items, the existence of those disputes precludes the award of prejudgment interest.**

---

[38] As shown by proposed Ex. 322 the amounts claimed to have been paid by appellants to Hansen, Bova and DuBois were as follows, which is $57,677.73 more than the $265,019.44 which the accountants agreed was paid to those persons:

Paid to Hansen per Ex. 322	$ 60,044.00
Paid to Bova " " "	61,753.17
Paid to Dubois " " "	200,900.00
Total	**322,697.17**
Amount agreed upon between accountants	265,019.44
Downward adjustment by accountants	**$ 57,677.73**

[39] The accountants agreed that Bertoch and Poulson paid the following amounts to Hansen, Bova and Dubois, as shown in lines (16) and (17), Col. (B), page 2 of Ex. 140 :

Line #	Purpose of payment	Amount paid
(16)	Payment of Commissions to Hansen and Bova	$ 101,519.44
(17)	Buyout of DuBois	163,500.00
	Total	**$ 265,019.44**

(ix) **General & administrative expenses.** The accountant agreement settled the dispute as to which of the alternative methods should be used to compute General and Administrative Expenses (G&A).[40] There was a dispute at trial between Lefavi and Bertoch as to whether Exhibit 312 was Attachment "A" to their original agreement, Ex. 6. Lefavi denied that he had seen a copy of Ex. 312[41] prior to the lawsuit, and denied he had agreed that 20% or any other amount should be deducted for G&A in computing his share of the proceeds. Bertoch insisted the opposite.

The accountants agreed that G&A should be 20% of the gross, and their computations and the parties confirmed that agreement by their stipulation as to the accountant's schedules, Ex. 140. Line (14) of Ex. 140 shows the net effect of G&A on Lefavi's share as $5,951 based upon income as computed by Townsend, accountant for the appellants, and as $17,287 based upon income as computed by Foerster, accountant for Lefavi. The trial court could have adopted the "Minimum," "Maximum," or some middle ground as the correct computation to determine Lefavi's share of the proceeds.

---

[40] A substantial dispute existed as to whether General and Administrative expenses should be allowed, and if so, whether they should be computed as 20% of the gross, or if they should be based upon actual expenses incurred. During trial there was a substantial dispute as to whether Lefavi had agreed to the terms of Ex. 312, which provided for G&A to be computed as 20% of the gross.

[41] The typewritten portion of Ex. 312 provides, "Twenty Percent of the gross income will be held by Richards Street Development co. for general and administrative expenses."

But it is undisputed that by stipulating to Exhibit 140 the parties resolved the G&A dispute and agreed that 20% of the gross should be deduced for G&A expenses. That dispute would also have been left to the court's decision after weighing conflicting evidence, but for the agreement between the accountants. **That dispute, which was not resolved until mid-trial stipulation, also precludes the award of prejudgment interest.**

(x) **Credit for stock sales.** The accountants resolved the dispute as to the $53,715[42] amount of the net credit to be allowed to Bertoch for proceeds given to Lefavi from stock purchased and sold by Bertoch in the stock market (if the trial judge determined to allow that credit). During the trial Lefavi disputed both the amount of the credit and whether credit should be allowed.

The fact that the accountants settled the dispute as to the amount of credit does not change the fact that, but for their agreement, this dispute too would have had to be resolved by Judge Lewis using judgment based upon disputed trial evidence. Whether the credit would be allowed at all was a dispute which the court had to resolve using judgment. Each of those **disputes preclude the award of prejudgment interest.**

---

[42] See Line (17), Col. (B) and (C), page 1 of Ex. 140. The stock offset consists of $36,693 [Ex. 140, line (16), col. (B) & (C)] which was applied to cover Lefavi's shortfall in recovering his original $68,875 investment in the LV Project and $17,022 [Ex. 140, line (17), col. (B) & (C)], which was Bertoch's share of the profit retained by Lefavi.

5. Still more issues remained to be resolved by the Court, even after the stipulation. Disputed factual issues **not** resolved by the accountants, and which still had to be decided (and were decided) by Judge Lewis, included the following.

(a) **Whether appellants' cost to purchase shares of other partners should be included to determine appellants "pro-rata share"[43] or "proportional interest"[44] in the Las Vegas Project.** The parties disputed to the end as to whether investments by Bertoch and Poulsen in the Project should be deemed to include their purchase cost of shares of the Project bought from DuBois, Daines and Nelson.[45] See discussion later in this Brief.

In deciding those issues, the court had to use its "best judgment" based upon evidence. It necessarily follows that Lefavi's share was not "calculable through a mathematically certain procedure," and that Lefavi's claim for prejudgment interest must be denied. Shares of Las Vegas Project investment purchased from others are as follows:

---

[43] See 7/19/78 agreement, Ex. 6.

[44] See 4/19/79 agreement, Ex. 9.

[45] Before appellants bought those shares, appellants each owned 1/5 (for a collective total of 2/5) and DuBois, Daines and Nelson each owned 1/5, for a total of 3/5 of ½ of the LV Project. As a result of those purchases appellants collectively owned the entire 5/5 of ½ of the LV Project. Stated another way, before the purchase appellants collectively owned 40% and after the purchase they owned 100% of ½ of the L V. Project. As a result of those purchases Lefavis share also increased from a "proportional interest" in 40% to a proportional interest in 100% of ½ of the LV Project.

(i) **Appellants' payments to Hansen.** Although the agreement between the accountants resolved the dispute as to the amount paid to Hansen,[46] the Court still had to decide whether Bertoch and Poulsen were entitled to include the payments to Hansen in computing their investment in the Project.

(ii) **Appellants' payments to Bova.** Although the agreement between the accountants resolved the dispute as to the amount paid to Bova,[47] the trial court still had to decide whether Bertoch and Poulsen were entitled to include the payments to Bova in computing their investment in the LV Project.

(iii) **Appellants' payments to DuBois.** Although the accountants' agreement resolved the dispute as to the amount paid to DuBois,[48] Judge Lewis still had to decide whether to include the payments to DuBois in computing Bertoch and Poulsen's investment in the Project.

(iv) **How Appellants' payments to Daines and Nelson affects Lefavi's share of proceeds.** The accountants agreed that Bertoch and Poulson had paid $400,000 to Daines and Nelson[49] to purchase their share of the Project. The trial court was left to apply those amounts pursuant to its own judgment.

Judge Lewis did make the above determinations, and in virtually every instance she determined them against Appellants and in favor of Lefavi. Many of those

---

[46] See ¶ 7(g), P. 8 above.

[47] See ¶ 7(g), P. 8 above.

[48] See ¶ 7(g), P. 8 above.

[49] See Ex. 140, page 2, line (18) where the accountants agreed that $200,000 each, for a total of $400,000, had been paid by Bertoch and Poulson to Daines and Nelson to purchase their share of the LV Project.

determinations were in error (see discussion in sections which follow). But the very fact she had to consider and rule on those disputes illustrates the impropriety of then awarding prejudgment interest, on the erroneous notion that the amount of damage was liquidated years earlier.

6. The issues which were determined only at trial were material. For example, if appellants' purchase of shares of the Las Vegas Project were excluded (which they were) in computing their investment, then Lefavi's share should have been reduced to a "proportional interest" in only 40% of appellants' interest.[50] See discussion later in this Brief.[51]

Exclusion of any purchases of interest from other partners would proportionally reduce Lefavi's "proportional share." If one or more purchases by defendant of other partners' interest in the Las Vegas Project would have been excluded in computing

---

[50] Appellant Bertoch testified that, but for appellants' purchases of DuBois, Daines and Nelson's shares of the Project, appellants and Lefavi would have collectively owned only 2/5 of the ½ of the LV Project not owned by DASCO. In other words, Lefavi's share (whatever that share was determined to be) would be 40% of the share he will receive as a result of appellants acquiring Daines, Nelson and DuBois shares of the LV Project. The Court must decide from evidence adduced at the trial whether none, some, or all of the cost to appellants to purchase Daines, Nelson and DuBois shares of the LV Project are part of appellants' investment in the LV Project.

[51] If the Court were not to include those purchases of partnership shares, then appellants' investment is $1,440,368, and Lefavi's share of of the proceeds from the LV Project is 5.27%. See Ex. 140, page 2, line (15) and page 1, line (3), column (C). If the Court were to include appellants' $665,019.44 purchase cost of said partnership shares, then Lefavi's total investment in the LV Project is $2,105,387.39. See Ex. 140, page 2, line (15) and page 1, line (3), column (C). Lefavi's share of proceeds from the LV Project is 3.49%. See Ex. 140, page 2, line (21), column (B) and page 1, line (5), column (B).

appellants' investment, then Lefavi's share of the Project would have been below 5.27%, and perhaps as low as 3.49%. [52] It follows that if Lefavi did not invest in a "proportional share" of the interests acquired from Daines, Nelson or DuBois, then his "proportional share" would not include the 1/5 of the Las Vegas Project acquired by appellants from each of the excluded purchases, and that his "proportional share" would be proportionately less. As discussed above, **because in deciding those issues the trial court had to use its "best judgment" based upon evidence, it necessarily follows that Lefavi's share is not "calculable through a mathematically certain procedure," and it was error to award prejudgment interest.**[53]

Another material, disputed issue requiring the trial court's best judgment, was whether to allow Appellants a credit for a $32,182 payment Bertoch made to Lefavi.[54] See also discussion later in this Brief.

---

[52] See Ex. 140, page 2.

[53] See, *Andreason v. Aetna Cas. & Sur Co.*, 848 P.2d 171, 177 (Utah Ct. App. 1993); *Castillo v. Atlanta Casualty Company*, 939 P.2d 1204, 1212 (Utah App. 1997).

[54] This issue was whether Check #1148, dated 8/15/83 for $32,182, was paid to Lefavi as what was then believed to be his share of proceeds from the first sale. Appellants' testimony was that the check was payment of what was then believed to be Lefavi's share of the proceeds from the first sale, which testimony was supported by August, 1983 computations by Poulson's accountant. Ex. 226 summarizes Scott Poulsen's August, 1983 computation which arrive at the $32,182 payment to Lefavi. A copy of the $32,182 check is in Ex. 252. Lefavi accepted the check, but at trial he claimed it pertained to some unrelated transaction.

Prejudgment interest is not allowed because amount due was not calculable without the Court making judgmental decisions concerning disputed facts. As discussed above and summarized in the footnote,[55] but for the negotiations and the resulting agreements between the accountants and parties, the court would have been required to consider and decide each of those disputes, and to use its "best judgment in assessing the amount"(if any) owed to Lefavi. Even after that agreement, many disputed factual issues remain for resolution by the court, as illustrated above.

The fact that the accountant and parties were able to settle some disputed and to thereby narrow the issues to shorten the trial and avoid the necessity of presenting extensive evidence and many factual issues to the court for decisions did change the fact that Lefavi's share could not be where the Court must use its "best judgment" based upon evidence, into a case where Lefavi's share is was "calculable through a mathematically

---

[55] But for the stipulation, numerous disputes would have been decided by the Court after weighing disputed evidence, including such things as: (a) which of the alternative accounting methods was most appropriate, (b) the income received from lot sales, rent, etc. (c) the amount of income received from foreclosing property pledged by a buyer who defaulted, (d) whether each of the nine cost items stipulated to should be added as part of the cost of the lots, (e) the amount to downwardly adjust Appellants' cost of purchasing the 3/5 interest in Richards partnership, (f) the amount of the general and administrative expenses of the Project. (g) As part of the stipulation the accountants agreed that Appellants' cost of the Project was between $1,440,368 and $2,105,387, and that as a result Appellee's share of the proceeds was between 3.49% and 5.27% of the sale proceeds, depending upon which of the unresolved items listed in Ex. 140 were allowed. (h) The parties also agreed that as a result of a series of stock market transactions, Appellee received $53,715 more from Bertoch than he was entitled to receive, which Bertoch claimed as an offset.

certain procedure" by merely following "fixed rules of evidence and known standards of value."[56]

7. The trial court punished Appellants for their willingness to compromise. Judge Lewis held that the damages were liquidated enough that prejudgment interest would be awarded, even though the "liquidation" of the damages arose directly from the mid-trial stipulation fixing amounts and damage ranges. To assess over $100,000 damages against a defendant which could not have been assessed if stipulations were not entered into does violence to public policy favoring stipulation and the conservation of attorney fees and judicial time and resources.

The Court should rule that whether the damages were liquidated (for prejudgment interest entitlement purposes) is determined at the time the action is filed, or at some other pre-trial time, and cannot be affected by the parties and their experts joining to stipulate to eliminate some uncertainty from the financial issues.

Therefore, Lefavi's award of prejudgment interest must be reversed.

---

[56] *Andreason v. Aetna Cas. & Sur Co.*, 848 P.2d 171, 177 (Utah Ct. App. 1993); *Castillo v. Atlanta Casualty Company*, 939 P.2d 1204, 1212 (Utah App. 1997).

B. It was necessary to get the math right in order for the damages to be fixed.

1. However, simple math errors were made by Judge Lewis, which she declined to correct. For purposes of this issue, the Court may assume that the trial court was correct in determining that Appellants Bertoch and Poulson were liable to Lefavi. But even assuming liability, the damages must be computed correctly for the judgment to stand. Brief mention of the facts pertaining to this issue is helpful.

Las Vegas property was purchased. In about 1975 defendants/appellants Bertoch and Poulson were each 1/5 partners in the Richards Street Partnership, which acquired a ½ interest in 4 vacant lots in Las Vegas. They later acquired the rest of the partnership, and of the property, paying $563,500 (stipulated)[57] plus $101,519 in commissions (also stipulated).[58] The plan was to build a hotel on the property.

Lefavi bought a "proportionate share" of Project. In 1978 Plaintiff/Appellee Lefavi purchased a "pro-rata share" of Bertoch's share of the Project, which in 1979 was

---

[57] See Exhibit 140, stipulated to at R. 598-604.

[58] See Exhibit 140, stipulated to at R. 598-604.

changed to a "proportionate share"[59] of Bertoch's and Poulson's[60] interests in the Law Vegas Project.

Hotel project failed & lots were sold. If the hotel had been a success, of course there would have been no lawsuit. But it did fail, the expected profits did not come, and this case ensured.

The parties were unable to obtain financing, so the Hotel Project was abandoned and the lots were offered for sale. Over the next few years Appellants Bertoch and Poulson (and a Mr. Smith) made lease, option, contract and expense payments to finance payments that had to be made to preserve their right to purchase the lots. Lefavi refused to participate. The lots were eventually sold in 3 separate transactions.

Thus it became important at trial for the court to determine what the "proportionate share" of each party in the partnership, and to then calculate the correct amount of net proceeds of sale to which the proportion should be applied. Determining Lefavi's proportion, figuring out the net profit of the three parties, and applying the

---

[59] The hand-written 7/19/78 contract [Ex. 6] provided that each would own a "pro-rata share" and some interest. The 4/19/79 hand-written agreement [Ex. 9] eliminated interest, and provided that Appellants and Appellee each owned a "proportional interest" in the Project, based upon the amounts each invested in the Project.

[60] There was a dispute as to whether Lefavi was buying a "proportional interest" in only Appellant Bertoch's share of the Project, or of both Appellants. For purposes of the appeal it may be assumed that, as the trial court found, Lefavi purchased a share of both Appellants' interest in the Project.

former to the latter results in the damages owed. Fortunately, in the middle of trial the parties stipulated to most of the needed numbers.

2. The trial court incorrectly applied the stipulation.[61] Both sides of the case employed financial expert witnesses. In order to determine each party's "pro-rata share" of the profit, among other things it was necessary to determine the proceeds from lot sales, lot costs, project expenses, the costs to Appellants and Appellee, etc. The accounting records (for the 10 year period from 1978 when Appellee purchased an interest in the Project until the 3rd and final sale in 1988) were incomplete, substantial portions of the accounting records were missing, and the records located were inadequate to make a complete accounting. Each party employed accountants who spent extensive amount of time attempting to arrive at an accounting from partial records.

In the midst of trial, the experts had lunch together and ironed out many differences on August 28th. With their help, and in order to preserve the parties' and the court's resources, financial parameters were agreed to.[62] The stipulation was largely

---

[61] See, *Wentz Equipment v. Missouri Pacific Railroad*, 673 P.2d 1193 (Kansas App. 1983) (the trial court is bound by the fact stipulated to, and when the parties stipulate to facts, a trial court can render only such judgment as those facts warrant).

[62] Among other things, the parties stipulated that plaintiff/appellee Lefavi was entitled to received a "proportionate share" of the proceeds from all 4 lots, and that Appellant had paid $68,875 to purchase his interest in the Project.

crafted by cooperation between the two experts.[63] A copy of the numbers stipulated to was received as Exhibit 140. It is included in Appendix D to this brief. The parties compromised and settled numerous disputed fact and accounting issues.[64]

But the obvious benefit of stipulating was largely nullified when the **trial court wrongly applied the stipulation** and awarded damages which exceeded all reasonableness. Examples are set forth in the argument sections which follow.

Stipulations are favored, and should be honored by the courts.[65] Where they enter into a stipulation rather than to assemble witnesses and put on proofs as to an issue, the decree that can be entered in the case should be in conformity therewith.[66] The stipulation has a "greater binding effect" than the findings of fact by the trial court as to

---

[63] Tr. 598-604.

[64] But for the stipulation, numerous disputes would have been decided by the Court after weighing disputed evidence, including such things as: (a) which of the alternative accounting methods was most appropriate, (b) the income received from lot sales, rent, etc. (c) the amount of income received from foreclosing property pledged by a buyer who defaulted, (d) whether each of the nine cost items stipulated to should be added as part of the cost of the lots, (e) the amount to downwardly adjust Appellants' cost of purchasing the 3/5 interest in Richards partnership, (f) the amount of the general and administrative expenses of the Project. (g) As part of the stipulation the accountants agreed that Appellants' cost of the Project was between $1,440,368 and $2,105,387, and that as a result Appellee's share of the proceeds was between 3.49% and 5.27% of the sale proceeds, depending upon which of the unresolved items listed in Ex. 140 were allowed. (h) The parties also agreed that as a result of a series of stock market transactions, Appellee received $53,715 more from Bertoch than he was entitled to receive, which Bertoch claimed as an offset.

[65] See, *Richlands Irr. Co. v. Westview Irr. Co.*, 96 Utah 403 (Utah 1938).

[66] *Id.*

evidence, since a court may modify findings in apt time, but cannot modify the contract of the parties.[67]

As part of the stipulation, the accountants agreed that Appellants' cost of the Project was between $1,440,368 and $2,105,387, and that as a result Appellee's share of the proceeds was between 3.49% and 5.27% of the sale proceeds, depending upon which of the unresolved items listed in Ex. 140 were allowed.

The parties also agreed that as a result of a series of stock market transactions, Appellee received $53,715 more from Bertoch than he was entitled to receive, which Bertoch claimed as an offset.

C. The trial court acted inconsistently, excluding Appellants' cost of acquiring the rest of the partnership to determine each of the parties' "proportionate share," but then giving Lefavi a full share of the Project owned by the Appellants before Lefavi bought in.

1. The stipulated ranges were applied illogically. As noted, the stipulation provided a range of numbers for the court to apply, depending on its legal rulings. Surprisingly, though, Judge Lewis gave plaintiff/appellee Lefavi the best of both worlds: she gave him a full share of the partnership interests which defendants/appellants had

---

[67] *Id.* But see, *First of Denver Mortgage Investors v. Zundel and Associates*, 600 P.2d 521 (Utah 1979) (sets forth limited circumstances under which a court can occasionally relieve a party of its stipulation). Rarely is relief from a stipulation permitted, though, since courts are generally bound by them. *Dove v. Cude*, 710 P.2d 170 (Utah 1985).

purchased when they (without Lefavi's participation) bought out the remaining partners. Yet she refused to take into account the cost of buying those interests when deciding how much of the profits she should award to Lefavi.

This error is legal (and mathematical) in nature, so the standard of review is that of a conclusion of law:[68] correction of error, with no deference to the conclusions of the trial court.[69]

The court's conclusions and judgment would allow Lefavi to share in defendants' one half interest in the Las Vegas Properties without allowing credit to Bertoch and Poulson for their cost of acquiring the shares owned by DuBois, Daines and Nelson. Before those purchases, Bertoch and Poulson each owned **1/5th** of Richards Street Partnership. After those purchases Bertoch and Poulson each owned ½ of the Richards Street Partnership; a difference with very large financial implications for the parties.

2. The error cases extreme unfairness in determining damages. Had Bertoch and Poulson not acquired DuBois, Daines and Nelson's shares, Bertoch and

---

[68] See, *Morse v. Packer*, Supreme Court Docket # 97053 (Utah 1999).

[69] *Estate of Wolfinger v. Wolfinger*, 793 P.2d 393 (Utah App. 1990); *Sacramento Baseball Club, Inc. v. Great Northern Baseball Co.*, 748 P.2d 1058 (Utah 1987); *Bess v. Jensen*, 782 P.2d 542 (Utah App. 1989); *Knight v. Post*, 748 P.2d 1097 (Utah App. 1988); *Hansen v. Hansen*, 342 Utah Adv. Rep. 25, 958 P.2d 931 (Utah App. 1998). But see, *Mostrong v. Jackson*, 877 P.2D 1154 (Utah App. 1993).

Poulson would have owned only 2/5 of Richards Street's ½ interest, and Lefavi would have only participated in their 2/5.

Put simply, in figuring Lefavi's "proportionate share" to apply, Judge Lewis (1) gave him credit as if he were a participant in the buy-out of the additional partners; but (2) she did not take the buy-out cost into account in figuring the amount of profits to which the "proportionate shares" should be applied.[70] **If Lefavi is to share in the 3/5 partnership interests, then Bertoch and Poulson should receive credit for the cost of that 3/5.** Under no reasonable interpretation of the stipulated evidence could such a formulation be proper. The matter should be remanded for a new trial, or at least for the trial judge to redetermine damages, using the appropriate standards to determine "proportionate share" within the parameters of the parties' stipulation.

D. The trial court ignored undisputed evidence, and didn't do the math correctly in determining "proportionate share."

1. The trial court ruled contrary to undisputed evidence. Even though Appellants' (Bertoch's and Poulson's) testimony, canceled checks and other documents concerning the additional $665,019 invested by Appellants was undisputed, the trial

---

[70] As a result of their agreements, Ex. #6 & 9, Bertoch and Lefavi each owned a "proportional interest" [Ex. #9] in the Las Vegas Properties, and each was entitled to receive their "pro-rata share of the profits" [Ex. #6].

court held that Appellants had not "marshaled the necessary evidence . . .to meet their burden of proof" as to those items, and refused to include it as part of Appellants' cost in computing Lefavi's "proportional interest." As a result, the Court awarded Lefavi 5.27% of the sale proceeds instead of 3.49% (the more correct percentage had the Court included the $665,019).[71]

Appellee adduced no testimony or other evidence which disputed Appellants' testimony, canceled checks and other documents which showed that Appellants had paid $665,019 to buy the other 3/5 of the Richards partnership, and for commissions to acquire the Las Vegas lots. Yet the court ignored it. This is another way of stating the same error as is discussed in the immediately preceding section.

2. There is no "marshaling the evidence" problem. At first blush it may appear that portions of this brief are direct attacks on the *Findings of Fact* by the trial court. If so, marshaling of the evidence would be necessary.[72] Here, though, the

---

[71] If properly computed the 5.27% share of sale proceeds awarded to Appellee should be corrected to 4.56%. Bertoch and Poulson asked for the correction, but were rebuffed by Judge Lewis. If an error in computing the percentage is corrected, the 5.27% of sale proceeds awarded to Appellee should be corrected to 4.78%. The Court found that Appellants cost was $1,440,368 and that Appellee's cost was $68,875, for a total cost of $1,509,243. Based on those amounts, Appellee's "proportionate cost" was 4.56% [$68,875 ÷ 1,509,243 = 4.56%].

[72] *Moon v. Moon*, 1999 WL 22969 (Utah App. 1999). See also, *Child v. Newsom*, 354 Utah Adv. Rep. 21, 1998 WL 743724 (Utah 1998). The standard of review is whether "the evidence to support the verdict was completely lacking or was so slight and unconvincing as to make the verdict plainly unreasonable and unjust." Id, quoting *Nelson v. Trujillo*, 657 P.2d 730, 732 (Utah 1977). "To support an insufficiency of the evidence claim on appeal, 'the one challenging the verdict must marshal the evidence in support of the verdict and then demonstrate

stipulation (Appendix D) makes marshaling of contrary evidence irrelevant. Where a stipulation has been entered as to the facts, this Court is as well equipped as the trial judge to apply the numbers to come up with a proper damage figure.

3. Undisputed debt not allowed as an offset. Even though the evidence that Appellant was entitled to a $53,715 offset for Bertoch's loan was undisputed, and notwithstanding the adverse inference from Appellee having asserted his 5th amendment[73] privilege, the Court held, oddly, that Appellants had not "marshaled the necessary evidence . . .to meet their burden of proof"[74] and did not allow the offset.

Lefavi did not adduce any evidence to dispute Bertoch's $53,715 offset for Bertoch's loan. Instead, Appellee asserted his 5th amendment privilege against self-

---

that the evidence is insufficient when viewed in the light most favorable to the verdict." *Child*, supra, quoting *McCorvey v. State Dep't. of Transp.*, 868 P.2d 41, 44 (Utah 1993). These authorities relate to attacks on a jury verdict, but essentially the same standard applies where, as here, the matter was tried to a judge. See, *Interiors Contracting, Inc. v. Smith*, 881 P.2d 929, 932 (Utah 1994).

[73] If anything, the Fifth Amendment assertion can benefit Appellants, but cannot benefit Lefavi. See, treatment of invocation of privilege in *Hansen v. Hansen*, 342 Utah Adv. Rep. 25 (Utah App. 1998); *First Federal Sav. & Loan Ass'n v. Schamanek*, 684 P.2d 1257 (Utah 1984); *Affleck v. Third Judicial Dist. Court*, 655 P.2d 665 (Utah 1982).

[74] For a discussion of the **proper** reference to "marshaling" evidence, see the immediately preceding footnote.

incrimination when asked about the stock transactions. [75] Yet Judge Lewis denied that amount and failed to allow it as an offset, with no evidence to dispute it.

---

[75] Lefavi's assertion of his 5th Amendment privilege against self incrimination, together with Bertoch's un-controverted testimony, meet the burden of proof regarding offset for debt owed by Lefavi.

When a party invokes the 5th amendment privilege, the court may draw adverse inferences against that party. The standard of review regarding adverse inferences in claiming the 5th amendment is the "correction of error" standard, with no deference to conclusions of the trial court. *Hansen v. Hansen*, 342 Utah Adv. Rep. 25 (Utah App. 1998); *First Federal Sav. & Loan Ass'n v. Schamanek*, 684 P.2d 1257 (Utah 1984); *Affleck v. Third Judicial Dist. Court*, 655 P.2d 665 (Utah 1982).

"The proposition is well established that in civil cases a party's failure to respond to valid inquiries on the basis of the privilege against self-incrimination can give rise to an adverse inference against that party at trial." *First Federal Sav. & Loan Ass'n v. Schamanek*, 684 P.2d 1257, 1268 (Utah 1984), citing *Baxter v. Palmigiano*, 425 U.S. 308, 96 S.Ct. 1551, 47 L.Ed. 2d 810 (1976).

However, before an adverse inference will be drawn, an opposing party must advance evidence independent of the inference that connects the party claiming the privilege with the assertions promulgated by the opposing party. "[T]he inference is not enough, by itself, to sustain a judgment against [the party invoking the privilege] without some other evidence." Id. "The fact that a defendant in a civil suit assumes a substantial risk when he chooses to assert his [Fifth Amendment] privilege does not, however, mean that the plaintiff is relieved of his obligation to prove a case before he becomes entitled to judgment." Id. @ 1268, citing *Steinbrecher v. Wapnick,* 248 N.E. 2d 419, 427 (1969).

In this case, plaintiff/appellee Lefavi invoked the 5th amendment privilege regarding questions relating to the purchase and sale of securities that may have been in violation of the Securities and Exchange Commission rules prohibiting insider trading. Bertoch established that the proceeds from the sale of these securities were retained by Lefavi and that it was the intent of the parties that the proceeds of the sale of these securities would be used as an offset. Lefavi refused to answer a questions regarding these securities. The lower court, however, did not take into account un-controverted evidence proffered by Bertoch substantiating the purpose and the outcome of the purchases and sales of the securities at issue. This un-controverted evidence, along with the 5th amendment privilege invoked by Lefavi, establish that the account existed, that Lefavi took the proceeds from the sale of the securities, that it was the intent of the parties that the stock be purchased, held and sold at an appropriate time to offset any loss that Lefavi may assert against the appellants as a result of investing in the LV project.

In August 1983, after the first sale, a partial accounting computed Lefavi's share of the proceeds as $32,182, which Appellants paid to Appellee.[76] The second sale was in 1985 and the third was in 1988.[77]

E. The Court should have corrected the experts' math error[78] in computing each party's "proportionate interest" in the Project.

No one doubts that Lefavi's investment was $68,875. Comparing this amount to the total invested by the parties results in a percentage, which is the "proportionate share" of the sale proceeds which the court found that Lefavi was entitled.

---

[76] The accounting at the time of the first sale, which was in part prepared by a third-party CPA, computed the share due to Appellee as exactly the $32,182 paid to Appellee. Appellee admits that he received and retained that payment, but claims that it was paid as compensation for some vague service he allegedly furnished to an unrelated entity in which Bertoch had a small financial interest. Notwithstanding the overwhelming evidence to the contrary, the Court refused to allow credit to Appellants for that payment. Ex. 20 is a release, Lefavi is bound by that release, his claims were extinguished by the release, and the Court should have so found. The release Ex. 20, the payment to and retention by Lefavi of $32,182 as his share of the proceeds from the first sale, and the Bertoch-Lefavi agreement pursuant to which Bertoch purchased and sold stock as directed by Lefavi and gave Lefavi $36,693 to cover the shortfall on his investment in the Las Vegas Property, each constituted a settlement, accord and satisfaction and/or payment to Lefavi, each of which bars Lefavi's claims herein.

[77] No proceeds from the later sales were paid to Appellee because Appellants believed Appellee did not own a share of the other lots.

[78] See footnote #5, page 5 above.

By comparing Lefavi's $68,875[79] investment with the total investment in the Las Vegas Properties ($2,105,387.39[80] or $1,440,367.95[81] or somewhere between[82] those stipulated to extremes), the accountants computed Lefavi's share as 3.49%[83] if the Court were to determine that payments by Appellants Bertoch and Poulson to Hansen and Bova ($101,519.44),[84] DuBois ($163,500),[85] Daines and Nelson ($400,000)[86] are part of defendants investment in the Las Vegas Properties, and Lefavi's share as 5.27%[87] if the Court determines that none of those payments by defendants are part of defendants investment in the Las Vegas Project.

---

[79] Line (7), Col. (B) of Ex. 140.

[80] Line (19), Col (B), page 2 of Ex. 140. This $2,105,387.39 was the *low* end of the range stipulated to by the parties and their accountant experts. See discussion above.

[81] Line (15), Col (B), page 2 of Ex. 140. This $1,440,367.95 was the *high* end of the range stipulated to by the parties and their accountant experts. See discussion above.

[82] If the Court excludes as part of defendants' investment in the Las Vegas Properties, some but not all of the items listed in Lines (16), (17), (18) or (19), Col (B), page 2 of Ex. 140, then defendants total investment will decrease and Lefavi's percentage of the total investment will increase proportionately.

[83] Line (21), Col. (B), page 2 of Ex. 140.

[84] Line (16), Col. (B), page 2 of Ex. 140.

[85] Line (17), Col. (B), page 2 of Ex. 140.

[86] Line (18), Col. (B), page 2 of Ex. 140.

[87] Line (20), Col. (B), page 2 of Ex. 140.

In an effort to simplify the computation, the accountants applied their percentages to each of the dollar amounts paid by Appellants, and determined the dollar amount of change in the amount owed to Lefavi which would result if each of those individual payments is included or excluded as part of appellants' investment in the Las Vegas Properties. Those amounts from Ex. 140, and their effect on damages, are summarized in the footnote.[88]

As discussed above, Appellants' commission payments to Hansen and Bova were part of the cost of acquiring the Las Vegas Properties and the Court should find that they are part of defendants investment in the Las Vegas Properties.

As discussed above, Appellants' purchase of 3/5 of the ½ interest in the Las Vegas Project from DuBois, Daines and Nelson increased defendants ownership share of the

---

[88] The accountants' computation of the dollar amounts by which the damages owed to Lefavi will decrease if individual items paid by Appellants for the Las Vegas Project are included or are not included in computing defendants investment in the Las Vegas Properties are as follows (lifted from Exhibit 104):

Line #	Item	Amount paid	Dollar reduction in Amount due to Lefavi {Applying proportionate share %}
(11)	Payment of Commissions to Hansen and Bova	$101,519	$ 8,596
(12)	Buyout of DuBois share of the Las Vegas Properties	163,500 13,845	
(13)	Buyout of Daines and Nelson	400,000	33,870
	Totals	**$ 665,019**	**56,311**
(10)	Col. (B) - Minimum liability to Lefavi		103,406
(10)	Col. (C) - Maximum liability to Lefavi		$159,717

Las Vegas Project from 2/5 of the ½ to 100% of the ½, and the Court should allow those payments by defendants as part of the cost of their investment in the Las Vegas Project. But for Appellants' purchase of the other 3/5 share, the parties would have owned only 2/5 of ½ of the Las Vegas Properties, and Lefavi's share would also be proportionately reduced.

Lefavi cannot expect or be given the benefit of those purchases without allowing defendants to include the cost of those purchases as part of their investment in the Las Vegas Project. The trial court should have found that Appellants' payments to DuBois, Daines and Nelson are part of defendants investment in the Las Vegas Properties, and order the trial court to reduce the damages accordingly.

F. Lefavi clearly benefitted from a stock transaction, but the trial court erroneously refused to take that benefit into account.

By stipulating to Ex. 140 Lefavi agreed that he had received $53,715 in excess of his agreed share of the profits from stock purchased and sold by Appellant Bertoch as directed by Lefavi. The $53,715 amount consists of $36,693 paid to Lefavi to cover the "Principal Shortfall" on his investment in the Las Vegas Properties, and that he was also overpaid $17,022 by Bertoch from proceeds from those stock transactions.

Yet the trial judge failed to allow either of those amounts as credits against amounts owed to Lefavi as his "proportionate share of the profits"[89] from the Las Vegas Properties. This would have been within the judge's discretion, if there had been any contrary evidence; but there was not.

When asked about the stock transactions, Lefavi refused to answer and asserted his 5th amendment rights against self-incrimination. Appellant Bertoch testified that the stock profits were to be applied first to cover Lefavi's shortfall on his investment in the Las Vegas Properties, and that the balance of the profit was to be divided equally between Lefavi and Bertoch. Bertoch explained that Lefavi's "shortfall" was the $36,693[90] difference between the $68,875 invested by Lefavi and the $32,182 paid to Lefavi from proceeds of the first sale. Lefavi has not disputed the stock agreement with Bertoch, or that he received the $53,715. The evidence is undisputed that Bertoch is entitled to an offset he did not receive, for that $53,715.

---

[89] Ex. 6.

[90] The $36,693 shortfall amount was stipulated to by Lefavi by agreeing to the statement in Line (16), page 1 of Ex. 140, included in Appendix D to this Brief.

VII. CONCLUSION

The trial Court has erred in the calculation of interest, the calculation of damages and the proper treatment of a 5th amendment invocation. The matter should be remanded and/or the judgment should be reduced and corrected.

RESPECTFULLY SUBMITTED, effective the 29th day of January, 1999, with the final version filed on February 5, 1999.

Ronald C. Barker
Attorney for Defendants/Appellants

VIII. CERTIFICATE OF SERVICE

I do hereby certify that on February 5, 1999, I caused to be mailed two true and correct copies of the foregoing with attachment, postage prepaid, to the following:

Douglas E. Griffith, Esq., KESSLER & RUST, 36 South State #2000, Salt Lake City, Utah 84111

Ronald C. Barker

APPENDIX "A"

JUDGEMENT

FILED DISTRICT COURT
Third Judicial District

MAY 29 1998

SALT LAKE COUNTY
By M. Small
Deputy Clerk

DOUGLAS E. GRIFFITH (4042)
JOSEPH C. RUST (2835)
KESLER & RUST
Attorneys for Plaintiff
36 South State Street, Suite 2000
Salt Lake City, Utah 84111
Telephone: (801) 532-8000

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

2223114
6-2-98

BRUCE A. LEFAVI, an individual, Plaintiff, v. RICHARD K. BERTOCH, an individual, and WILLIAM E. POULSON, an individual, Defendants.	**ORDER OF FINAL JUDGMENT** Civil No. 920906147 CV Judge Leslie A. Lewis

This matter came on for trial beginning on August 25, 1997 and continuing through August 29, 1997 before the Honorable Leslie A. Lewis, with Plaintiff Bruce A. Lefavi (hereinafter "Lefavi") being represented by his counsel, Joseph C. Rust and Douglas E. Griffith of Kesler & Rust, and the Defendants Richard K. Bertoch (hereinafter "Bertoch") and William E. Poulson (hereinafter "Poulson") being represented by their counsel, Ronald C. Barker.

The Court having heard the evidence, having reviewed the exhibits, having heard the arguments of counsel, having ruled from the bench at the conclusion of the trial and thereafter having issued its Ruling in written form on December 22, 1997 and an Amended Ruling on January 5, 1998, and the Court having now entered its Findings of Fact and Conclusions of Law as to this action, now enters its Order of Final Judgment.

WHEREFORE, by virtue of the law, and by reason of the premises aforesaid, it is ordered, adjudged and decreed as follows:

1. Plaintiff Bruce A. Lefavi is hereby awarded judgment against defendants Richard K. Bertoch and William E. Poulson, jointly and severally, in the principal amount of $159,717.00, together with prejudgment interest in the amount of $96,482.00 as of December 31, 1997, and additional prejudgment interest from January 1, 1998 to the date of judgment, which is the date of execution of this Order, consisting of _____ days at the rate of $26.25 per day for additional prejudgment interest of $_____, for a total judgment of $_____. It is further ordered that this judgment shall be augmented by postjudgment interest, pursuant to Utah Code Anno. § 15-1-4, at the rate of 7.468% simple per annum from the date of judgment until paid in full.

2. The Counterclaims of defendants Bertoch and Poulson against Lefavi are dismissed with prejudice pursuant to stipulation by the parties made on the record during the trial of this action.

Judgment rendered this 29th day of May, 1998.

BY THE COURT:

THE HONORABLE LESLIE A. LEWIS

CERTIFICATE OF SERVICE

I hereby declare that I caused to be hand-delivered a true and correct copy of the **ORDER OF FINAL JUDGMENT** in Civil No. 920906147CV, this 6 day of April, 1998, to:

Ronald C. Barker
BARKER LAW OFFICE
2870 South State Street
Salt Lake City, Utah 84115-3692
Attorney for Defendants Bertoch and Poulson

Melissa Saddler

F:\DATA\DGRIF\LEFAV\ORDRJDG2.BER

APPENDIX "B"

JUDGEMENT

DOUGLAS E. GRIFFITH (4042)
JOSEPH C. RUST (2835)
KESLER & RUST
Attorneys for Plaintiff
36 South State Street, Suite 2000
Salt Lake City, Utah 84111
Telephone: (801) 532-8000

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

222 3114

BRUCE A. LEFAVI, an individual, Plaintiff, v. RICHARD K. BERTOCH, an individual, and WILLIAM E. POULSON, an individual, Defendants.	Amended **ORDER OF FINAL JUDGMENT** Civil No. 920906147 CV Judge Leslie A. Lewis

LAL

This matter came on for trial beginning on August 25, 1997 and continuing through August 29, 1997 before the Honorable Leslie A. Lewis, with Plaintiff Bruce A. Lefavi (hereinafter "Lefavi") being represented by his counsel, Joseph C. Rust and Douglas E. Griffith of Kesler & Rust, and the Defendants Richard K. Bertoch (hereinafter "Bertoch") and William E. Poulson (hereinafter "Poulson") being represented by their counsel, Ronald C. Barker.

The Court having heard the evidence, having reviewed the exhibits, having heard the arguments of counsel, having ruled from the bench at the conclusion of the trial and thereafter having issued its Ruling in written form on December 22, 1997 and an Amended Ruling on January 5, 1998, and the Court having now entered its Findings of Fact and Conclusions of Law as to this action, now enters its Order of Final Judgment.

WHEREFORE, by virtue of the law, and by reason of the premises aforesaid, it is ordered, adjudged and decreed as follows:

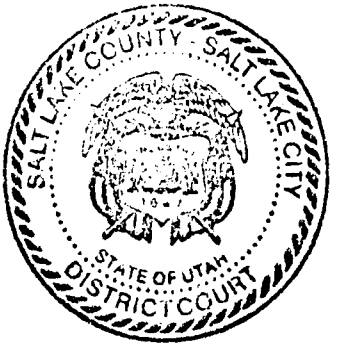
1. Plaintiff Bruce A. Lefavi is hereby awarded judgment against defendants Richard K. Bertoch and William E. Poulson, jointly and severally, in the principal amount of $159,717.00, together with prejudgment interest in the amount of $96,482.00 as of December 31, 1997, and additional prejudgment interest from January 1, 1998 to the date of judgment, which is the date of execution of this Order, consisting of 149 days at the rate of $26.25 per day for additional prejudgment interest of $3,911.25, for a total judgment of $260,110.25. It is further ordered that this judgment shall be augmented by postjudgment interest, pursuant to Utah Code Anno. § 15-1-4, at the rate of 7.468% simple per annum from the date of judgment until paid in full.

2. The Counterclaims of defendants Bertoch and Poulson against Lefavi are dismissed with prejudice pursuant to stipulation by the parties made on the record during the trial of this action.

Judgment rendered this 15th day of June, 1998.

BY THE COURT:

THE HONORABLE LESLIE A. LEWIS



CERTIFICATE OF SERVICE

I hereby declare that I caused to be mailed a true and correct copy of the **ORDER OF FINAL JUDGMENT** in Civil No. 920906147CV, this ___ day of _____, 1998, to:

Ronald C. Barker
BARKER LAW OFFICE
2870 South State Street
Salt Lake City, Utah 84115-3692
Attorney for Defendants Bertoch and Poulson

DOUGLAS E. GRIFFITH (4042)
JOSEPH C. RUST (2835)
KESLER & RUST
Attorneys for Plaintiff
36 South State Street, Suite 2000
Salt Lake City, Utah 84111

F:\DATA\DGRIF\LEFAV\ORDRJDG2.BER

APPENDIX "C"

DOUGLAS E. GRIFFITH (4042)
JOSEPH C. RUST (2835)
KESLER & RUST
Attorneys for Plaintiff
36 South State Street, Suite 2000
Salt Lake City, Utah 84111
Telephone: (801) 532-8000

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

BRUCE A. LEFAVI, an individual, Plaintiff, v. RICHARD K. BERTOCH, an individual, and WILLIAM E. POULSON, an individual, Defendants.	**FINDINGS OF FACT AND CONCLUSIONS OF LAW** Civil No. 920906147 CV Judge Leslie A. Lewis

This matter came on for trial beginning on August 25, 1997 and continuing through August 29, 1997 before the Honorable Leslie A. Lewis, with Plaintiff Bruce A. Lefavi (hereinafter "Lefavi") being represented by his counsel, Joseph C. Rust and Douglas E. Griffith of Kesler & Rust, and the Defendants Richard K. Bertoch (hereinafter "Bertoch") and William E. Poulson (hereinafter "Poulson") being represented by their counsel, Ronald C. Barker. The Court having heard the evidence, having reviewed the exhibits, and having heard the arguments of counsel, ruled from the

bench at the conclusion of the trial and thereafter issued its Ruling in written form on December 22, 1997 and an Amended Ruling on January 5, 1998. Based on the evidence heard and received by the Court and based on its rulings issued in this action , the Court now enters its Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Lefavi, Bertoch and Poulson are residents of Salt Lake County or were conducting business in Salt Lake County and therefore are subject to the jurisdiction and venue of this Court.

2. In and around the middle of 1975, Bertoch and Poulson acquired a portion of an interest held by Dasco, Inc., a Nevada corporation, and Dudley Smith, a resident of Nevada, in certain real properties located in Clark County, State of Nevada (hereinafter "the Las Vegas Properties").

3. As of February, 1976, Bertoch and Poulson's interest in or share of the Las Vegas Properties was held in the name of Richard Street Development Company ("Richards Street"), an unregistered partnership of which Bertoch and Poulson were partners.

4. In 1982, Bertoch and Poulson's interest in the Las Vegas Properties was transferred to Russell Road Development Co., a Nevada partnership ("Russell Road"), in exchange for a 50% ownership of Russell Road.

5. By July, 1978, the Las Vegas Properties, which consisted essentially of three parcels of real property located near the Las Vegas Airport, known to the parties as Lot Numbers 8, 10 and

11. Parcel 10 was being purchased on a contract, and the other parcels were leases and options to purchase.

6. On July 19, 1978, Bertoch and Poulson, by and through Bertoch, engaged in discussions with Lefavi concerning Lefavi becoming an investor with them in their interest in the Las Vegas Properties.

7. During the July 19, 1978 meeting, Bertoch represented to Lefavi that he, Lefavi, would be acquiring an interest in Bertoch and Poulson's joint interest in the Las Vegas Properties and that such properties consisted of all of Lots 8, 10 and 11.

8. During the July 19, 1978 meeting, Bertoch and Lefavi agreed that Lefavi was participating in the Bertoch and Poulson partnership which held their interest in the Las Vegas Properties and that when the properties sold, Lefavi would be "re-imbursed" [sic] his investment principal, plus 8% per annum interest and a pro-rata share of the profits generated from the Las Vegas Properties. The pro rata share would be determined by the total money invested by Lefavi into the Las Vegas Properties compared to the total monies invested by Bertoch and Poulson into the Las Vegas Properties.

9. In reliance on Bertoch's representations, Lefavi made an initial investment in the amount of $6,600.00 which he paid to Bertoch on July 19, 1978, and thereby acquired an interest of Bertoch and Poulson's interest in the Las Vegas Properties. The investment and agreement was memorialized in a memorandum drafted and signed by Bertoch dated July 19, 1978, admitted into

evidence as Exhibit 6, and the memorandum, together with an attachment describing the Las Vegas Properties, admitted into evidence as Exhibit 7, were delivered to Lefavi at the time of his investment.

10. From July, 1978 through December, 1980, Lefavi made additional investments with Bertoch and Poulson by paying money to either Bertoch or Finco, a Utah corporation jointly owned and controlled by Bertoch and Poulson. In total, Lefavi invested $68,875.00 in the Las Vegas Properties.

11. At the time of his said payments, and on other occasions from July 1978 through December, 1980, Lefavi met with Bertoch and/or Poulson and discussed what was being done on the Las Vegas Properties, how their respective interests were being calculated and what, if any, changes were being made to their investment agreement.

12. During one such meeting, held on April 19, 1979, Bertoch, Poulson and Lefavi were all present and agreed to change the terms and arrangement of Lefavi's investment in the Las Vegas Properties. It was determined and agreed to by the parties that Lefavi's investment agreement would be changed to a proportional share basis in exchange for Lefavi's contribution of money toward an interest in the Las Vegas Properties. This agreement was memorialized in a memorandum drafted and signed by Bertoch dated April 19, 1979, admitted into evidence as Exhibit 9.

13. Lefavi's investment of a proportional interest in the Las Vegas Properties was to be determined as follows: the total proceeds received by Bertoch and Poulson from the sale or lease of

the Las Vegas Properties, less reasonable and anticipated closing costs and other expenses relating to such closings, resulting in proceeds which would then be divided among Bertoch, Poulson, and Lefavi in proportion to the total monies each had actually contributed to the Las Vegas Properties.

14. No other terms regarding calculation of the proceeds, proportional share or deductible expenses were agreed to by Bertoch, Poulson and Lefavi.

15. In reliance on this modified agreement, Lefavi continued to invest monies into the Las Vegas Properties from April, 1979 through December, 1980.

16. According to their testimony given in Court, at the time Bertoch and Poulson solicited Lefavi's investment in the Las Vegas Properties, Bertoch and Poulson claim to have intended Lefavi's investment to be limited to: (a) an interest in Bertoch's share but not Poulson's share of the Las Vegas Properties; (b) an interest in Lot 10 of the Las Vegas Properties but not an interest in any of the other lots which constituted the Las Vegas Properties; (c) a return based solely on any net profits received by Bertoch from the sale of Lot 10, and no return from the investment until Bertoch had deducted any and all expenses as Bertoch deemed appropriate.

17. At the time Bertoch and Poulson solicited Lefavi's investment in the Las Vegas Properties, Bertoch and Poulson either misrepresented or omitted to disclose to Lefavi any of the terms or conditions reflected in Paragraph 16 above, upon which material misrepresentations and omissions Lefavi relied in making his investment in the Las Vegas Properties.

18. Had the terms and conditions of the investment as described in Paragraph 16 above been fully disclosed to Lefavi, Lefavi never would have made the investment in the Las Vegas Properties. Consequently, Lefavi's investment monies were obtained by Bertoch and Poulson by false pretenses, false representations, material omissions and fraud.

19. In June 1983, Lot 10 of the Las Vegas Properties was sold in a transaction with an individual named Gilbert Sellan for $1,870,000.00, of which $1,200,000.00 was paid in cash and $670,000.00 was paid in the form of a Promissory Note, secured by 22 residential lots in a subdivision known as Vista Del Sol in Las Vegas, Nevada as reflected in Exhibits 45 and 49, which were received and admitted.

20. Ultimately, the entire purchase price for Lot 10 was paid through a foreclosure on the Promissory Note and a foreclosure sale of the 22 lots of the Vista Del Sol.

21. In response to the first sale of the Las Vegas Properties, Scott Poulson, a Certified public Accountant who is also the son of defendant Poulson, prepared a summary and accounting of all monies invested into the Las Vegas Properties by Poulson, Bertoch and Lefavi, which summary was admitted into evidence as Exhibit 76.

22. In or around June 1983, Bertoch, Poulson, and Lefavi met to discuss the first sale of the Las Vegas Properties. During the meeting a copy of Exhibit 76, without the handwritten portion on the third page thereof, was shown to Lefavi. In the meeting, Bertoch and Poulson represented to Lefavi that no proceeds from that sale would be paid to either Bertoch or Poulson because all sale

proceeds had been used to pay off other debts, encumbrances, and obligations against the remaining parcels of the Las Vegas Properties. Consequently, Lefavi received no proceeds from the first sale of the Las Vegas Properties.

23. Contrary to Bertoch and Poulson's representations, a check for $415,257.92 was paid to Bertoch and Poulson from the proceeds of the 1983 sale. In addition, Bertoch's 1983 tax returns, admitted into evidence as Exhibit 115, reported the first sale of the Las Vegas Properties as an installment sale for $450,296.00 as the total share which he expected to receive and reported receiving $288,960 in 1983 from the first sale of the Las Vegas Properties. Poulson's 1983 tax returns, admitted into evidence as Exhibit 104, reported the first sale of the Las Vegas Properties as an installment sale for $414,018.00 as the total share which he expected to receive and reported receiving $265,680.00 in 1983 from the first sale of the Las Vegas Properties.

24. Subsequent to the 1983 sale, funding of the Las Vegas Properties was through bank loans which were guaranteed by Bertoch and Poulson. As a result, neither Bertoch nor Poulson invested any more of their own monies in the Las Vegas Properties.

25. From the 1983 sale through 1988, certain portions of the Las Vegas Properties were leased, and generated income which was used to pay joint venture expenses.

26. From 1983 to 1991, Lefavi continually inquired of Bertoch and Poulson whether any additional sales of the Las Vegas Properties had occurred. In each instance, Bertoch or Poulson told

Lefavi no sales were occurring and the remaining portion of the Las Vegas Properties was still held by the parties.

27. Despite the foregoing representations by Bertoch and Poulson, two sales did in fact occur on the Las Vegas Properties between 1983 and 1991.

28. In 1985, portions of Lots 8 and 11 were sold to Clark County for $2,962,000.00, of which $700,000.00 was paid in cash and $2,262,000.00 was paid with a Promissory Note secured by the Las Vegas Properties being sold. From 1985 through 1988, Clark County paid tax-free interest on the Promissory Note. Such interest was used to pay interest on a trust deed note filed against the same property. In March 1988, Clark County paid off the entire remaining balance of the Note.

29. As a result of the 1985 sale to Clark County, Bertoch and Poulson each reported on their 1985 tax returns, admitted into evidence as Exhibits 117 and 106 respectively, installment sales of $740,500.00 attributable to their respective shares of the Las Vegas Properties sold to Clark County. Each reported receipt of $175,000.00 and a taxable profit of $89,250.00 from the sale for the 1985 tax year.

30. In December, 1988, the final remaining portions of the Las Vegas Properties were sold to Las Vegas Resorts, Inc. for $2,865,000.00, of which $1,432,500.00 was paid in the form of 28,650,000 shares of restricted stock in Las Vegas Resorts, Inc. and $1,432,500.00 was paid in the form of a Promissory Note to be paid by January, 1991.

31. As a result of this sale to Las Vegas Resorts, Inc., Bertoch and Poulson each reported on their 1989 tax returns, admitted into evidence as Exhibits 121 and 110 respectively, an installment sale of $393,938.00 attributable to their respective shares of the Las Vegas Properties sold to Las Vegas Resorts, Inc. Each reported having received $35,813.00 of that amount in 1989.

32. Bertoch and Poulson received their proportional share of the restricted stock of Las Vegas Resorts, Inc. in April, 1989, which amounted to 7,162,500 shares each.

33. In February, 1991, Bertoch and Poulson each received a cash disbursement in excess of $300,000.00 when the Las Vegas Resorts, Inc. promissory note was paid in full. As a result of the Las Vegas Resorts, Inc. note being paid, Bertoch and Poulson each reported on their 1991 tax returns, admitted into evidence as Exhibits 123 and 112 respectively, total sale proceeds of $358,125.00 attributable to their respective shares of the note proceeds received from Las Vegas Resorts, Inc.

34. The most credible and reliable evidence establishing the proceeds received by Bertoch and Poulson in connection with the sale of Las Vegas Properties are the tax returns of Bertoch and Poulson, which were prepared closely in time to the receipt of such proceeds.

35. Based on calculations agreed to by both parties' accounting experts, stipulated to by the parties as accurate, presented to the Court as Exhibit 140, and admitted into evidence, the gross proceeds actually and constructively received by Bertoch and Poulson from their share of the Las Vegas Properties totaled $3,300,033.00 (the total of lines (1) and (2) of page 1 of Exhibit 140).

36. In and about September, 1991, Lefavi, still believing no sales of the Las Vegas Properties had occurred since 1983, approached Bertoch and requested that his name be placed on the Clark County records as partial owner of the Las Vegas Properties, so that his ownership interest in the Las Vegas Properties would be a matter of public record.

37. During that conversation, Bertoch disclosed to Lefavi for the first time that all of the Las Vegas Properties had been sold.

38. On or about September 19, 1991, Bertoch met with Lefavi and represented that although all of the Las Vegas Properties had been sold, no proceeds had been distributed to either Bertoch or Poulson as the result of such sales.

39. Bertoch disclosed that the only consideration that he and Poulson had received as a result of the sales of the Las Vegas Properties was certain restricted stock in Las Vegas Resorts, Inc.

40. Bertoch presented to Lefavi two stock certificates, admitted into evidence as Exhibit 21, one in the name of William Poulson and one in the name of Richard Bertoch, each certificate totaling 716,250 shares or 10% of their holdings of Las Vegas Resorts stock.

41. During this meeting, Bertoch stated that the delivery of this stock to Lefavi constituted a 100% reimbursement of Lefavi's interest in the Las Vegas Properties and that there would be no other proceeds which he was entitled to receive because there were no other proceeds received by Bertoch and Poulson.

42. Bertoch then requested that Lefavi execute a letter acknowledging that he had received the stock certificates as represented by Bertoch. Lefavi executed the letter, admitted into evidence as Exhibit 20, prepared by Bertoch and dated September 19, 1991.

43. At the request of Lefavi to support the income tax reporting of Lefavi's interest in the Las Vegas Properties, on December 15, 1991, Bertoch sent a letter to Lefavi, admitted into evidence as Exhibit 23, stating that the only consideration Lefavi had received in return for his investment in the Las Vegas Properties was the 1,432,500 shares of restricted stock in Las Vegas Resort, Inc.

44. As set forth above, from 1983, the date of the first sale of the Las Vegas Properties, through 1991, Bertoch and Poulson committed fraud by selling portions of the Las Vegas Properties while misrepresenting to Lefavi that no sales were occurring and that the Las Vegas Properties were still being held by the parties.

45. As a result of the above-referenced fraud, Bertoch and Poulson obtained by false pretenses, false representations and material omissions, and actual fraud Lefavi's share of the proceeds generated from the sales of Las Vegas Properties, which share is determined below.

46. As a direct result of the above-referenced fraud, Lefavi was delayed and prevented by Bertoch and Poulson from discovery on a timely basis the sales of the Las Vegas Properties and the resulting proceeds attributable to Lefavi's share, and was denied the opportunity to pursue payment of such proceeds when they were distributed to Bertoch and Poulson, in trust for Lefavi.

47. As a direct result of the above-referenced fraud, Bertoch and Poulson breached the fiduciary trust Bertoch and Poulson had assumed toward Lefavi when they had solicited and accepted his monies for a proportional share of their interest in the Las Vegas Properties and held his interest together with their own in the Las Vegas Properties.

48. In the latter part of December, 1991, Lefavi contacted Dudley Smith of Dasco, Inc., the Nevada based partner in the Las Vegas Properties, and questioned him regarding the proceeds received from sales of the Las Vegas Properties.

49. In the course of such conversation and upon receipt of documents sent by Dudley Smith, Lefavi learned for the first time that the three sales of the Las Vegas Properties had yielded substantial proceeds to the parties, including Bertoch and Poulson. Dudley Smith's cover letter to Lefavi was admitted into evidence as Exhibit 22.

50. Upon receiving Exhibit 22 and other materials from Dudley Smith, Lefavi confronted Bertoch with his new found knowledge of the sales proceeds received from the Las Vegas Properties and Bertoch agreed to provide Lefavi a full accounting of such proceeds received. Bertoch also promised that to the extent there were any monies due and owing Lefavi, Bertoch would make sure Lefavi was paid.

51. There was insufficient credible or admissible evidence presented during the course of the trial which would support the claims of Bertoch and Poulson to having made certain payments to Lefavi from the Las Vegas Properties sales, adjustments to the calculation of proportional interests

of the parties, and offsets and expenses which would reduce Lefavi's share of the proceeds attributable to Bertoch and Poulson's interest in the Las Vegas Properties..

52. There was insufficient credible or admissible evidence presented during the course of the trial which would support Bertoch and Poulson's claims that the following items relate to and reduce or affect the proceeds due Lefavi from his investment in the Las Vegas Properties: (a) payments of commissions to Hansen and Bova; (b) a buy out of DuBois; (c) a buy out of Daines and Nelson; (d) deduction for additional general and administrative expenses; (e) a payment to Lefavi of $32,182.00; (f) amounts paid to Lefavi from stock profits; and (g) amounts paid to Lefavi on stock transactions.

53. In reliance on Exhibit 140 which was prepared and calculated by the respective accounting experts for Lefavi on the one hand and Bertoch and Poulson on the other, and stipulated to by the parties as accurately portraying the applicable dollars amounts for the Court to consider in its ruling, the total proceeds attributable to Bertoch and Poulson is $3,203,875.00 from sales of the Las Vegas Properties, plus $96,158.00 from a sublease resulting from the Las Vegas Properties, for total proceeds of $3,300,033.00.

54. The total investment basis of Bertoch and Poulson in the Las Vegas Properties is $1,440,368.00. Inasmuch as Lefavi's total investment is $68,875.00, Lefavi's proportional share of the total proceeds of Bertoch and Poulson is 5.27%.

55. Lefavi is entitled to a return of his principal of $68,875.00, together with 5.27% of the gross profit from Bertoch and Poulson's share from the sales and subleases of the Las Vegas Properties, which gross profit, as contained in Exhibit 140, is $1,859,665.00, of which Lefavi's share is $98,004.00, resulting in the total amount of $166,880.00 as Lefavi's share of Bertoch and Poulson's interest in the Las Vegas Properties.

56. The only payment made by Bertoch and Poulson to Lefavi as a return on his share of the total proceeds from Lefavi's investment with Bertoch and Poulson was the Las Vegas Resort stock which has a value of $7,163.00.

57. After deducting the $7,163.00 payment to Lefavi from his share of the total proceeds, Bertoch and Poulson are liable to Lefavi for the unpaid principal balance due and owing for his interest in the Las Vegas Properties in the amount of $159,717.00.

CONCLUSIONS OF LAW

58. By a preponderance of the evidence, Lefavi established that Lefavi entered into a valid and binding contract with Bertoch and Poulson, who were acting as partners, by which Bertoch and Poulson sold to Lefavi a proportional share in their interest in the Las Vegas Properties.

59. By a preponderance of the evidence, Lefavi established that Bertoch and Poulson breached the contract when they failed and refused to pay to Lefavi his proportional share of the proceeds they received from the Las Vegas Properties, which unpaid proportional share totals $159,717.00.

60. By a preponderance of the evidence, Lefavi established that there was no legal excuse for Bertoch and Poulson's failure to perform on the contract.

61. By clear and convincing testimony and evidence, Lefavi established that Bertoch and Poulson committed actual fraud on Lefavi at the inception of the investment when Bertoch and Poulson misrepresented and omitted to disclose to Lefavi material facts concerning the scope, terms and conditions of Lefavi's investment.

62. Lefavi in reasonable reliance on false representations, false pretenses and materials omissions by Bertoch and Poulson invested monies in the amount of $68,875.00 with Bertoch and Poulson.

63. By clear and convincing testimony and evidence, Lefavi established that Bertoch and Poulson also committed a continuing fraud on Lefavi beginning in 1983 and continuing through

1991 by making false representations and false pretenses, and omitting to disclose material facts regarding the sales of the Las Vegas Properties and the proceeds received therefrom by Bertoch and Poulson.

64. By clear and convincing testimony and evidence, Lefavi established that Bertoch and Poulson committed conversion of Lefavi's funds when they received Lefavi's proportional share of the proceeds from each of the sales of the Las Vegas Properties and then withheld and converted for their own use Lefavi's proceeds.

65. By clear and convincing testimony and evidence, Lefavi established that the investment solicited by Bertoch and Poulson from Lefavi created a fiduciary relationship and duty of trust on the part of Bertoch and Poulson for the benefit of Lefavi, and Bertoch and Poulson breached their fiduciary duty of care when they obtained and retained for their own benefit Lefavi's share of the proceeds received from the Las Vegas Properties.

66. By clear and convincing testimony and evidence, Lefavi established that Lefavi established that Bertoch and Poulson breached the fiduciary duty owed among partners to deal with each other in good faith and to disclose material matters, which breach directly caused damages to Lefavi.

67. By clear and convincing testimony and evidence, Lefavi established that Lefavi did not fail to mitigate his damages because Bertoch and Poulson's actions, misrepresentations, and

omissions toward Lefavi regarding the sales of the Las Vegas Properties denied Lefavi access to sufficient information required to mitigate his damages.

68. By clear and convincing testimony and evidence, Lefavi established that the September 19, 1991 letter (Exhibit 20) executed by Lefavi does not constitute a waiver or release by Lefavi of any of his claims, the document itself is void of any release or waiver language, and no consideration, beyond that to which Lefavi was already entitled, was paid by Bertoch or Poulson to obtain any such release or waiver of claims.

69. By clear and convincing testimony and evidence, Lefavi established that Lefavi's signature on Exhibit 20 was obtained by fraudulent inducement by Bertoch through his direct misrepresentations and material omissions regarding the sales of the Las Vegas Properties given at the time the document was executed by Lefavi.

70. By clear and convincing testimony and evidence, Lefavi established that there has been no accord and satisfaction or payment to Lefavi for his investment in the Las Vegas Properties.

71. The counterclaims of Bertoch and Poulson, consisting the claims of malicious prosecution, abusive civil process, and breach of contract with regard to the Las Vegas properties joint venture or the securities transactions, were treated as affirmative claims and dismissed by stipulation during trial. However, Bertoch and Poulson reserved their claim regarding the securities transactions as offsets or affirmative defenses.

72. By clear and convincing testimony and evidence, Lefavi established that all applicable statute of limitations relating to Lefavi's claims were tolled by reason of Bertoch and Poulson's fraud and fraudulent inducement resulting from their false representations concerning no sales of the Las Vegas Properties, consequently, Lefavi's claims were timely brought.

73. By a preponderance of the evidence, Lefavi established that the contractual obligations to pay proceeds to Lefavi based on sales of the Las Vegas Properties was one continual contract consisting of a series of payments due when the portions of the Las Vegas Properties were sold and proceeds paid, which continuous, ongoing contract was not breached in its entirety until February, 1991, when the final proceeds were paid to Bertoch and Poulson from the promissory note on the sale to Las Vegas Resorts, Inc. and the appropriate share of such proceeds were not paid to Lefavi. Therefore, the applicable statute of limitations did not begin to run until February 1991.

74. The damages incurred by Lefavi in connection with his claims of breach of contract, fraud, conversion, and breach of fiduciary duties are complete, fixed as to a particular time, and the loss can be measured by facts and figures, or in other words, ascertained with mathematical certainty, as demonstrated by the parties' stipulation to the applicable calculations and amounts contained in Exhibit 140.

75. The claims of Lefavi are based on causes of actions at law, as well as equity, and are within the perimeters and policy of applicable Utah case law for the awarding of prejudgment

interest in order to fully compensate Lefavi for his actual losses and prevent unjust enrichment to Bertoch and Poulson who intentionally withheld amounts due and owing Lefavi.

76. Pursuant to applicable statute, Lefavi is entitled to interest at the rate of 6% simple interest on the total proceeds which should have been paid to Lefavi, which interest is to be calculated from the dates proceeds were received by Bertoch and Poulson until the date of judgment, and thereafter the judgment amount should accrue interest at the judgment rate until paid in full. Therefore, pre-judgment interest is awarded in the amount of $96,482.00 from the applicable dates up through December 31, 1997, and interest accrues thereafter to the date of judgment at the rate of $26.25 per day.

77. As to the First Cause of Action for Breach of Contract, Lefavi is entitled to be awarded judgment in the principal amount of $159,717.00, together with prejudgment interest in the amount of $96,482.00 as of December 31, 1997, and thereafter to the date of judgment at the rate of $26.25 per day, and interest at the judgment rate as set forth by Utah statute from the date of judgment until paid.

78. As to the Second Cause of Action for Fraud, Lefavi is entitled to be awarded judgment in the principal amount of $159,717.00, together with prejudgment interest in the amount of $96,482.00 as of December 31, 1997, and thereafter to the date of judgment at the rate of $26.25 per day, and interest at the judgment rate as set forth by Utah statute from the date of judgment until paid.

79. As to the Third Cause of Action for Conversion, Lefavi is entitled to be awarded judgment in the principal amount of $159,717.00, together with prejudgment interest in the amount of $96,482.00 as of December 31, 1997, and thereafter to the date of judgment at the rate of $26.25 per day, and interest at the judgment rate as set forth by Utah statute from the date of judgment until paid.

80. As to the Fourth Cause of Action for Breach of Fiduciary Duty of Care, Lefavi is entitled to be awarded judgment in the principal amount of $159,717.00, together with prejudgment interest in the amount of $96,482.00 as of December 31, 1997, and thereafter to the date of judgment at the rate of $26.25 per day, and interest at the judgment rate as set forth by Utah statute from the date of judgment until paid.

Entered this 29th day of May, 1998.

BY THE COURT:

THE HONORABLE LESLIE A. LEWIS

SALT LAKE COUNTY UTAH SALT LAKE CITY STATE OF UTAH DISTRICT COURT

CERTIFICATE OF SERVICE

I hereby declare that I caused to be hand-delivered a true and correct copy of the **FINDINGS OF FACT AND CONCLUSIONS OF LAW** in Civil No. 920906147CV, this 16 day of April, 1998, to:

Ronald C. Barker
BARKER LAW OFFICE
2870 South State Street
Salt Lake City, Utah 84115-3692
Attorney for defendants Bertoch and Poulson

Melissa Saddler

F:\DATA\DGRIF\LEFAV\PRFINDF3.BER

APPENDIX "D"

Exhibit 401-70

Lefavi v. Bertoch, et. al.
Calculation of Results of Transactions Using Tax Return Information

	(A)	(B)
	Selling Price	**Amount**
(1)	Bertoch/Poulson/Lefavi Share of Selling Price per Tax Returns	$ 3,133,190.00
(2)	Plus: Adjustment to Arrive at 50% of Selling Price[1]	70,685.00
(3)	Bertoch/Poulson/Lefavi Adjusted Share of Selling Price (½ of total sales price)[2]	$ 3,203,875.00
	Purchase Price	
(4)	Bertoch/Poulson/Lefavi Cost Basis per Tax Returns	$ 1,286,865.00
(5)	Plus: Adjustment to Arrive at 50% of Tax Basis[1]	20,758.00
(6)	Plus Acquisition-Related Costs Not Included in Tax Basis:	
(7)	Payment to Lawyer's Title on Sellan Sale to Release Encumbrances	44,928.52
(8)	Payment to Levinson of 11 months Interest on Sellan Sale	18,012.69
(9)	Payment of Taxes, Revenue Stamps, & Recording Fees on Sellan Sale	5,431.08
(10)	Payment to Keltner on Clark County Sale	45,477.87
(11)	Payment of Interest to Levinson on Clark County Sale	5,716.19
(12)	Payment of Rent to Lamb on Clark county Sale	2,358.02
(13)	Payment of Taxes, Revenue Stamps, Etc. on Clark County Sale	7,495.48
(14)	Payment of Taxes on LV Resorts Sale	3,325.11
(15)	BASIS UNDER MAXIMUM DAMAGE CALCULATION	$ 1,440,367.95

Application of Disputed Issues of Fact:

(16)	Payment of Commissions to Hansen and Bova	101,519.44
(17)	Buyout of DuBois	163,500.00
(18)	Buyout of Daines and Nelson	400,000.00
(19)	BASIS UNDER MINIMUM DAMAGE CALCULATION	$ 2,105,387.39

Lefavi Percentage Interest in Gross Investment

(20)	LEFAVI PERCENTAGE UNDER MAXIMUM DAMAGE CALCULATION	5.27%
(21)	LEFAVI PERCENTAGE UNDER MINIMUM DAMAGE CALCULATION	3.49%

PLAINTIFF'S EXHIBIT

Exhibit 400

Lefavi v. Bertoch, et. al.
CALCULATION OF UNDER/(OVER)PAYMENT TO BRUCE LEFAVI
Tax Return Method

	(A)	(B) MINIMUM	(C) MAXIMUM
(1)	Bertoch/Poulson/Lefavi Adjusted Share of Selling Price	$3,203,875	$3,203,875
(2)	Plus: Net benefit from Sellan sublease	96,158	96,158
(3)	Less: Bertoch/Poulson/Lefavi Adjusted Share of Purchase Price	2,105,387	1,440,368
(4)	Gross Profit from Sales of Properties [(1) - (2)]	$1,194,646	$1,959,665
(5)	Multiplied by: Lefavi Percentage of Gross Investment	3.49%	5.27%
(6)	Net Lefavi Interest in Profit from Sales [(5) - (6)]	$ 41,693	$ 98,004
(7)	Plus: Lefavi Investment in Properties	68,875	68,875
(8)	Lefavi Total Interest in Sales [(7) + (8)]	$ 110,569	$ 166,880
(9)	Less: Payment of Stock	7,163	7,163
(10)	AMOUNT UNPAID BEFORE DISPUTED CREDITS	$ 103,406	$ 159,717

Reconciliation of Amounts Unpaid Before Disputed Credits

AMOUNT UNPAID BEFORE DISPUTED CREDITS - MAXIMUM		$ 159,717
(11)	Payment of Commissions to Hansen and Bova	8,596
(12)	Buyout of DuBois	13,845
(13)	Buyout of Daines and Nelson	33,870
AMOUNT UNPAID BEFORE DISPUTED CREDITS - MINIMUM		$ 103,406

Affect of Additional Fact Disputes:

(14)	General & Administrative Expenses	$ 5,951	$ 17,287
(15)	Check #1148	~~31,362~~ 32,182	~~31,362~~ 32,182
(16)	Amounts Paid to Lefavi from Stock Profits to Cover Principal Shortfall	36,693	36,693
(17)	Overpayment to Lefavi on Stock Transactions	17,022	17,022

PLAINTIF
EXHIBI
140